No. 83-751

IN THE

Supreme Court of the United States

October Term, 1983

SECURITIES AND EXCHANGE COMMISSION, *et al.*,

Petitioners,

vs.

JERRY T. O'BRIEN, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

AMICUS CURIAE BRIEF OF WEDBUSH, NOBLE, COOKE, INC. IN SUPPORT OF AFFIRMANCE

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QUESTION PRESENTED

Whether the Court of Appeals exceeded its equitable powers to ensure that subpoena-enforcement proceedings will provide an adequate remedy at law for abuses proven there by ordering that investigation targets who allege abuse of process by the Securities and Exchange Commission in third-party subpoenas receive notice of subpoena issuances.

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AMICUS CURIAE BRIEF OF WEDBUSH, NOBLE, COOKE, INC.

INTEREST OF AMICUS CURIAE

Amicus Wedbush, Noble, Cooke, Inc. ("Wedbush") files this brief with the consent of Petitioners and Respondents. Wedbush is a broker-dealer registered with the Securities and Exchange Commission ("SEC") pursuant to the Securities Exchange Act of 1934, 15 U.S.C. §78a *et seq.* Wedbush is currently a named subject of an SEC investigation. *In the Matter of Wedbush, Noble, Cooke, Inc. and Kenneth Eliott*, SEC File No. LA-402 (April 6, 1983). Upon a motion by Wedbush, the District Court for the Central District of California has preliminarily enjoined the SEC from issuing third-party subpoenas in its investigation without complying with *Jerry T. O'Brien, Inc. v. SEC*, 704 F.2d 1065 (CA9 1983), the decision before this Court for review. *Wedbush, Noble, Cooke, Inc. v. SEC*, No. CV-83-3961 CMB (Kx) (July 11, 1983), appeal pending, No. 83-6035

(C.D. Cal.), stay denied, 714 F.2d 923 (CA9 1983). This Court's decision and opinion will control the proceedings in Wedbush's case and the SEC's further conduct of its investigation. Accordingly, Wedbush has a direct interest in the Court's resolution of the question presented as well as a general interest as a member of the securities industry. Wedbush believes that the judgment in *O'Brien* must be affirmed.

STATEMENT OF THE CASE

This case is before the Court on facts deemed to be true. Respondents, targets of an SEC investigation, allege that the SEC in bad faith issued outstanding subpoenas to third parties. The District Court granted the SEC's motion to dismiss Respondents' complaints for injunction. The Court of Appeals reversed. It ordered notice of third-party subpoenas, to be given to investigation targets who allege SEC abuse in such subpoenas. This Court granted certiorari. Respondents' allegations of bad faith in third-party subpoenas therefore come to this Court as true for purposes of the Court's review.

This procedural posture explains the factual basis of the Court of Appeals' judgment. Read properly, the two opinions of the District Court and the opinion of the Court of Appeals make clear that the judgment below rested on an exercise of equitable power to fashion the decree required by the particular facts of the case. The Court of Appeals fashioned the notice decree in order to ensure that the target will have the opportunity to make his allegations of abuse at a subpoena-enforcement proceeding. The Court of Appeals relied on its equitable power in ordering notice, and exercised that power because of the allegations of abuse. Petitioners SEC *et al.* have failed to note that the allegations

prompting the notice order were deemed to be true and have failed to perceive the legal source of the order. As a result, Petitioners have misdirected their arguments in this Court.

A. Respondents' Complaints and the District Court Decisions.

Respondents are named subjects of an SEC formal order of investigation issued in September 1980.[1] The formal order authorized the investigation of suspected violations of the Securities Act of 1933, 15 U.S.C. §77a *et seq.* ("Securities Act"), and the Securities Exchange Act of 1934, 15 U.S.C. §78a *et seq.* ("Exchange Act"). In September 1981, Respondents filed their complaints for injunctive and other relief in the District Court for the Eastern District of Washington. They alleged improper conduct by the SEC in three respects. One, they alleged that the SEC leaked to the news media the existence and suspicions of the non-public investigation. Two, an SEC staff member allegedly rummaged through files containing personal documents of Respondent Harrison in violation of his right of privacy. Three, Respondents alleged that the SEC issued to them subpoenas not meeting the good-faith requirements of *United States v. Powell*, 379 U.S. 48 (1964); that is, subpoenas without legitimate purpose, without a requisite relevancy, without procedural compliance, and without a need for the information demanded. Respondent O'Brien sought to restrain Respondent Magnuson from complying with a subpoena served upon him.[2] Respondent Magnuson cross-claimed to

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[1]The formal order of investigation did not name Respondents Jerry T. O'Brien or Jerry T. O'Brien, Inc., but the SEC informed them that they were among the "others" whom the formal order stated were suspected of securities violations.

[2]As in the Brief for the Petitioners (Petrs. Br. 3, n. 3), "O'Brien" includes Jerry T. O'Brien, Jerry T. O'Brien, Inc., Benjamin A. Harrison, and Pennaluna & Co., Inc. "Magnuson" means Harry F. Magnuson and H.F. Magnuson & Co.

enjoin the investigation. The SEC moved to dismiss all claims.

The District Court granted the SEC's motion to dismiss as to Respondents' claims for injunction. In an opinion and order filed on January 20, 1982, the court held that denial of subpoena enforcement is an adequate remedy at law against subpoenas issued in bad faith. Respondents could refuse compliance with the subpoenas and raise their claims at a subpoena-enforcement action if the SEC commenced one. (Pet. App. 17a-24a.) Accordingly, an injunction would not lie.[3] The court made no ruling on Respondents' non-injunctive claims.

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[3]The District Court made the basis for its initial order clear in its subsequent order of March 25, 1982. After citing authority that a subpoena recipient is free to resist compliance and raise claims of bad faith at an enforcement proceeding, the court stated: "Denial of injunctive relief in the initial Order was predicated upon the foregoing considerations. The existence of an adequate remedy at law in the form of an enforcement hearing would clearly render extraordinary relief unavailable." (Pet. App. 10a.)

The District Court did not base its initial order on a rejection of Respondents' allegations of bad faith in the subpoenas directed to them. The court never made final findings of fact that the SEC had met the good-faith standard of *United States v. Powell*, 379 U.S. 48 (1964). Rather, as the court explained in Part III-A of its initial order, the court inquired only whether the SEC had made a prima facie case of good faith. In the court's view, "a prima facie case may be made out of little more than mere mechanical recitation of congressionally-authorized functions." (Pet. App. 19a.) Indeed, as to three parts of the *Powell* standard, the court looked to the SEC's formal order of investigation to determine from the face of that alone whether the standard had been met. On the fourth part, whether the SEC was demanding information already possessed, the court looked only to the face of the subpoenas. The court never made findings on Respondents' evidence in rebuttal of the prima facie showing, for the court then decided in Part IV of its order that Respondents could present their evidence only at the subpoena-enforcement action.

Thus, the court never made final findings of fact on *Powell*. It found prima facie compliance with *Powell*, with the exception that the SEC had missed one possibly required administrative step as to O'Brien. The court then dismissed the injunctive complaints because of the adequate remedy at law.

After the court's order, the SEC "waged an aggressive investigation, issuing numerous subpoenas in the Spokane area to various mining companies and brokers." (Pet. App. 10a.) Respondents returned to the District Court and sought injunctive relief against claimed SEC abuses in these third-party subpoenas. Respondents claimed that these subpoenas suffered the same defects as the subpoenas directed to them. Respondents further contended that if the court were again to commend them to the subpoena-enforcement proceeding, then they must receive notice of third-party subpoenas. Without notice, Respondents contended, they would not know if or when subpoena-enforcement proceedings would occur and could not urge denial of enforcement on the ground of abuse. In those circumstances, Respondents argued, denial of enforcement cannot be an adequate remedy negating an injunction.

The District Court denied injunctive relief in a memorandum and order filed on March 25, 1982. The court did not address the merits of Respondents' allegations of bad faith in the third-party subpoenas.[4] Rather, in the court's view, Respondents lacked standing and had an alternative adequate legal remedy besides the subpoena-enforcement proceeding: Respondents could move in any subsequent proceeding against them to suppress information obtained through abusive third-party subpoenas.

B. The Court of Appeals' Decision.

The Court of Appeals for the Ninth Circuit affirmed the dismissal of the injunctive complaint as to subpoenas directed to Respondents and reversed the denial of injunctive

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[4]Respondents sought relief as to third-party subpoenas only after the January 20, 1982 opinion and order, as the SEC recognizes. (Petrs. Br. 5.) The January 20, 1982 opinion and order, and its prima facie findings on *Powell*, concern only the subpoenas directed to Respondents.

relief as to third-party subpoenas. Only the reversal judgment is before this Court for review.

The Court of Appeals recited at the outset the procedural posture of the case as it then stood. The District Court had granted a motion to dismiss Respondents' injunctive claims on the ground that "agency-initiated subpoena enforcement proceedings afforded Respondents an adequate legal remedy." 704 F.2d 1065, at 1066. Accordingly, the Court of Appeals noted, "this appeal presents only questions of law." *Id.* Like the District Court, the Court of Appeals did not address the merits of Respondents' allegations as to third-party subpoenas.

The legal question before the court was whether, Respondents having alleged abuse in third-party subpoenas, a third-party subpoena-enforcement proceeding afforded an adequate opportunity to Respondents to present evidence of their allegations. The court held that such a proceeding is not adequate unless Respondents know of the third-party subpoenas. The court chose to exercise its power to assure that the proceeding would be an adequate remedy for the allegations, if proven there, by ordering notice of subpoena issuances. Because the District Court had not ordered notice, the Court of Appeals reversed that part of the judgment and remanded.

SUMMARY OF ARGUMENT

Exercising equitable power, the Court of Appeals in this case properly fashioned an order of notice to ensure that denial of subpoena enforcement is an adequate remedy for bad-faith SEC subpoenas.

I.

The issuance of third-party subpoenas in violation of the good-faith requirement of *United States v. Powell*, 379 U.S. 48 (1964), violates a protectable interest of the party under

investigation. *Powell* forbids the judicial enforcement of an SEC subpoena issued in bad faith. The prohibition protects the interests of parties affected by the subpoena to be free from agency compulsion beyond the agency's authority, purpose, or need. This Court has long recognized the interest in freedom from improper agency compulsion. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); *United States v. Morton Salt Co.*, 338 U.S. 632 (1950). The target of the SEC investigation is aggrieved by every violation of that interest, whether the SEC directs the bad-faith subpoenas to him or to third parties, for it is information about him and his affairs that the abusive investigation demands, exploits, and exposes.

The Court of Appeals correctly held that, unless the target knows of the subpoenas, denial of enforcement at a subpoena-enforcement action is inadequate to remedy violations of the target's interest committed through abusive third-party subpoenas. Since *Reisman v. Caplin*, 375 U.S. 440 (1964), the courts have recognized the target's practical problem: he cannot challenge third-party subpoenas of which he is unaware. In this case, where the target alleged abuses that if proven would warrant denial of subpoenas at enforcement proceedings, the Court of Appeals correctly held that notice is required to ensure that those proceedings will afford an adequate remedy.

II.

The Court of Appeals had the equitable power to order notice in this case. The "essence of equity jurisdiction has been the power . . . to mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321 (1944). Additionally, the court's inherent power to protect against abuse of its process supported the notice order. *United States v. Powell*, 379 U.S. 48 (1964); *Gumbel v. Pitkin*,

124 U.S. 131 (1888).

The Court of Appeals did not abuse its discretion in fashioning a notice order in this case. The notice order contemplates a procedure in which the target alleging abuse must make a prima facie showing in order to obtain notice. A notice order in such circumstances does not improperly impose procedures on the SEC. Notice is a preferable remedy to an exclusionary remedy, and notice will not unduly burden SEC investigations. If the target shows abuse, then a notice order is necessary to ensure a remedy and to protect court process.

III.

This Court should not decide in this case the question whether notice to targets of subpoena issuances is required in every SEC investigation. Because the facts of the case do not raise that question, any such decision would be dictum. As no conflict exists among the courts of appeals on that question, no resolution by this Court is necessary. Moreover, the factual record in this case does not sufficiently inform the Court for an analysis of this important question. Therefore, although believing that notice is required in every investigation, Amicus Wedbush suggests that the Court not address or decide the question in this case. Rather, the Court can and should hold that the Court of Appeals correctly exercised its equitable powers in this case to order notice so that Respondents can present their evidence of abuse at a subpoena-enforcement proceeding.

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY HELD THAT, UNLESS NOTICE IS GIVEN OF THE SUBPOENA ISSUANCE, THE SUBPOENA-ENFORCEMENT ACTION WILL NOT PROVIDE THE ADEQUATE REMEDY FOR THIRD-PARTY SUBPOENAS ISSUED IN BAD FAITH.

The Court of Appeals agreed with Respondents that "subpoena enforcement proceedings do not afford targets an adequate legal remedy unless the agency notifies them of the identities of the subpoenaed third parties." 704 F.2d, at 1067. The Court of Appeals termed the target's interest a "right to be investigated consistently with the *Powell* standards." 704 F.2d, at 1068, 1069. This interest to be investigated only in good faith is the interest that requires protection and remedy if injured. The Court of Appeals correctly recognized this interest of targets in third-party subpoenas. The court correctly held that violations of the interest will not be remedied through subpoena-enforcement proceedings if the target received no notice of the third-party subpoenas.

A. The SEC's Issuance of Third-Party Subpoenas in Violation of *Powell* Violates the Target's Interest in the Good-Faith Conduct of the Investigation.

The subject of an SEC investigation has a protectable interest in seeing that subpoenas issued in that investigation satisfy *United States v. Powell*, 379 U.S. 48 (1964). A subpoena that fails to satisfy *Powell* aggrieves that interest, whether the SEC directs the subpoena to the subject or a third party. This Court has long recognized that interest of

the subject, or "target,"[5] and has protected it.

Powell demands that agencies issue their subpoenas in good faith. 379 U.S., at 58. While *Powell*'s statement of the elements of agency good faith is not exhaustive, *United States v. LaSalle National Bank*, 437 U.S. 298, 317, n. 19 (1978); *SEC v. ESM Government Securities, Inc.*, 645 F.2d 310, 314 (CA5 1981); *SEC v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 124-125 (CA3 1981) (en banc), the *Powell* statement has become the accepted general standard. Thus, to obtain enforcement of a subpoena, the agency "must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the [agency's] possession, and that the administrative steps required . . . have been followed." 379 U.S., at 57-58. The courts of appeals have applied this standard to SEC subpoenas.[6] *E.g.*, *SEC v. ESM Government Securities, Inc.*, *supra*, 645 F.2d, at 313, n. 3; *SEC v. Wheeling-Pittsburgh Steel Corp.*, *supra*, 648 F.2d, at 123,

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[5] "Target" is not a precisely defined term in discussions of investigations and subpoenas, but its imprecision should not pose such grave uncertainties as the SEC suggests. (Petrs. Br. 31-33.) Generally, the "target" of an investigation is the party whom the SEC suspects of securities violations. Presumably that party is often the named subject of the formal order of investigation. To be sure, when the SEC commences an investigation because of suspicious transactions — extraordinary trading just before a tender offer is the SEC's example (Petrs. Br. 32, n. 43) — there may be many potential targets. But in fulfilling its enforcement duty, the SEC will inevitably narrow its attention to specific parties. The Court need not define when a party becomes a target. It is enough that the SEC clearly suspected Respondents in this case of securities violations, and that any party who seeks notice of subpoenas in a future case will have to show the kind of interest, described in Part I-A of this brief, that SEC bad faith in subpoenas would violate.

[6] The SEC does not dispute that the *Powell* standard has been commonly applied to SEC subpoenas. See Petrs. Br. 26, n. 31. In *SEC v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 123, n. 5 (CA3 1981) (en banc), the SEC assumed that *Powell* applied.

n. 5; *SEC v. Blackfoot Bituminous, Inc.*, 622 F.2d 512, 515 (CA10), *cert. denied*, 449 U.S. 955 (1980); *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1024, n. 39 (CADC 1978), *cert. denied*, 439 U.S. 1071 (1979); *SEC v. Howatt*, 525 F.2d 226, 229 (CA1 1975); *SEC v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (CA2 1973), *cert. denied*, 415 U.S. 915 (1974).

The *Powell* standard of good faith is the minimum conduct required of the SEC in its exercise of subpoena power. The standard represents the balance the Court has struck between the competing interests at stake in the enforcement of administrative subpoenas.[7] In the interests of effective enforcement of Congress' policies, the Court has preserved Congress' power to authorize agency investigations of the broadest latitude consistent with constitutional protections. But mindful that investigation is intrusion, and a burden on the affairs and resources of private parties, the Court prohibits judicial enforcement of agency subpoenas that seek to compel information outside the agency's authority, information too indefinitely defined, or information not reasonably relevant to the agency's inquiry.[8] *United States v. Morton Salt Co.*, 338 U.S. 632, 652-653 (1950); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208, 213 (1946); *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943); *FTC v. American Tobacco Co.*, 264 U.S. 298,

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[7]Congress too has recognized the tension between agencies' necessarily wide latitude to investigate and private interests, those of the subject of investigation and other affected parties. Congress has therefore routinely granted power to the agencies to issue subpoenas, but reserved to courts the power to enforce. *E.g.*, Section 22(b) of the Securities Act of 1933, 15 U.S.C. §77v(b); Section 21(c) of the Securities Exchange Act of 1934, 15 U.S.C. §78u(c); Section 7402(b) of the Internal Revenue Code, 26 U.S.C. §7402(b).

[8]The SEC's Canons of Ethics, 17 C.F.R. §200.66, forewarn that "the power to investigate carries with it the power to defame and destroy."

306-307 (1924). These prohibitions protect the "interests of men to be free from officious intermeddling, whether because irrelevant to any lawful purpose or because unauthorized by law, concerning matters which on proper occasion and within lawfully conferred authority of broad limits are subject to public examination in the public interest." *Oklahoma Press Publishing Co. v. Walling, supra*, 327 U.S., at 213. The good-faith requirement protects the same interests by requiring a legitimate purpose to the investigation, a relevancy in the information sought, an adherence to the agency's own procedures, a need behind the inquiry, and a shunning of any action that would abuse Congress' entrustment of subpoena power to the agencies.

A subpoena issued in violation of *Powell*, in bad faith, perforce violates the private interests of those affected by it. The affected parties are burdened with illegitimate agency demands,[9] and the courts refuse to enforce such subpoenas. *Powell* stated, "It is the court's process which is invoked to enforce the administrative summons, and a court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose . . . or for any other purpose reflecting on the good faith of the particular investigation." 379 U.S., at 58.

The target of the investigation feels personally every violation of this interest to be free from subpoenas in bad

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[9]The *Powell* standard echoes the Fourth Amendment standard articulated for agency subpoenas by *Oklahoma Press Publishing, supra*, and *Morton Salt, supra*. The differences in the *Powell* standard are attributable to the particular Internal Revenue Code provision at issue in *Powell*. That provision dictates certain administrative steps and prohibits "unnecessary" investigations. As discussed in Part III of the argument, there is no need for the Court to consider whether or to what extent the *Powell* standard reflects constitutional concerns, and the Court should not consider those questions. It is sufficient for the decision of this case that the *Powell* standard has become an accepted protection recognized by federal case law against agency subpoenas in bad faith.

faith, whether the subpoena is directed to him or a third party. It is information about the target that an overbroad subpoena compels. The target's affairs are exposed by an unauthorized governmental inquiry, with all the distraction of time and energy, the inevitable publicity, and the cast of suspicion and doubt among the target's customers, colleagues, and personnel. The agency may use against the target the information obtained in disregard of the checks of administrative procedures. The target suffers these abuses from any bad-faith subpoena in the investigation of him. Whether the bad-faith subpoena is directed to him or to a third party, the violation of *Powell* violates the target's interest in freedom from "officious intermeddling."

The target's interest suffers whether the SEC violates the particular elements of good faith described in *Powell* or demonstrates bad faith in some novel manner. The Court explained in *United States v. LaSalle National Bank, supra*, 437 U.S., at 317, n.19, "The *Powell* elements were not intended as an exclusive statement about the meaning of good faith. . . . The dispositive question in each case, then, is whether the [agency] is pursuing the authorized purposes in good faith." The courts of appeals have properly rejected an SEC contention that this Court "has foreclosed incremental development of the law by the courts when [they] are faced with allegations of egregious abuses." *SEC v. Wheeling-Pittsburgh Steel Corp., supra*, 648 F.2d, at 123; *SEC v. ESM Government Securities, Inc., supra*, 645 F.2d, at 314-315 (holding that fraud, deceit, or trickery are grounds for denial of enforcement). When the SEC uses the subpoena power bestowed by Congress in a manner or for a purpose that abuses Congress' entrustment or the courts' power of enforcement, the SEC acts in bad faith and violates the target's interest.

The Court of Appeals in this case called the target's interest a right to be investigated consistently with the *Powell* standard. The Court of Appeals' description may be new, but the interest described is not. It is the interest that prompted the *Powell* standard, and the same kind of interest that this Court protected even before *Powell* by requiring authorized purpose and reasonable relevancy in cases like *Oklahoma Press Publishing*, *supra*, and *Morton Salt*, *supra*. Having recognized the interest, the Court of Appeals inquired whether the subpoena-enforcement proceeding adequately protects the interest when it is alleged to be violated by third-party subpoenas.

B. As to Abusive Third-Party Subpoenas, the Subpoena-Enforcement Proceeding Is Not an Adequate Remedy for the Target's Interest, Absent Notice of Subpoena Issuance.

This Court held in *Reisman v. Caplin*, 375 U.S. 440 (1964), that denial of enforcement at a subpoena-enforcement proceeding is an adequate remedy at law to subpoena recipients and other affected parties raising challenges to a subpoena. The lower federal courts ever since have recognized the question that *Reisman*'s holding necessarily raises: if the "other affected parties" have their remedy only at an enforcement proceeding, must not the affected parties receive notice of a subpoena so that they may raise their challenges? The Court of Appeals in this case struggled with the same question and correctly decided that notice must be given for the enforcement proceeding to afford its remedy to Respondents.

Reisman arose from an IRS subpoena issued to two taxpayers' accountants. The taxpayers' attorneys sued to enjoin voluntary compliance or enforcement on the ground that compliance would work an unlawful appropriation of at-

torney work product. The Court dismissed "for want of equity" because the taxpayers had an adequate remedy at law in the subpoena-enforcement proceeding provided by statute. 375 U.S., at 443. At that proceeding, the Court stated, "the witness may challenge the summons on any appropriate ground. . . . In addition, third parties might intervene to protect their interests, or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, may intervene." *Id.*, at 449. If the subpoena recipient were to indicate a willingness to comply, "either the taxpayer or any affected party might restrain compliance" to bring about the enforcement proceeding where he will make his challenge. *Id.*, at 450.

The question of notice arose promptly. Within a year of *Reisman* the Court of Appeals for the Second Circuit faced a target's claim for notice in *Application of Cole*, 342 F.2d 5 (CA2), *cert. denied*, 381 U.S. 950 (1965). Other courts subsequently recognized the question inherent in *Reisman*'s holding. *United States v. Schutterle*, 586 F.2d 1201, 1204 (CA8 1978); *United States v. Genser*, 582 F.2d 292, 300-301 (CA3 1978), *cert. denied*, 444 U.S. 928 (1979); *Scarafiotti v. Shea*, 456 F.2d 1052, 1053 (CA10 1972); *Kirschenbaum v. Beerman*, 376 F.Supp. 398, 399-400 (W.D.Pa. 1974). Indeed, in *United States v. Genser* the court incorporated the problem of notice into its statement of the law of subpoena challenges: the target "may attempt to restrain voluntary compliance by the third party, assuming that he is aware of the issuance of the summons prior to compliance, and he may challenge the validity of the summons by attempting to intervene in the ensuing enforcement proceedings." 582 F.2d, at 300-301 (footnotes omitted).

Because of the nature of Respondents' interests at stake in this case, the Court of Appeals fashioned a solution to the notice problem. The court had before it Respondents'

allegations that third-party subpoenas issued in bad faith were violating Respondents' interests as targets. The court recognized that, without notice, the target's opportunity to prove his claims and get relief depends on mere fortuity. The target may or may not learn of the subpoena. The third party himself might resist the subpoena, but usually will not. The third party might resist a burdensome subpoena, but probably will lack the motivation, resources, or nerve to resist on any other ground. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 219 (1946) (Murphy, J., dissenting) ("Many persons have yielded solely because of the air of authority with which the demand is made . . . ."). The third party in most events may not even realize the SEC's bad faith. The third party may not suffer from it; the target will.

Thus, unless notice is given to the target, the subpoena-enforcement proceeding will not afford the target the remedy for *Powell* violations that he could prove there. Without notice, the target may never receive the opportunity to present his proof. Denial of enforcement is therefore not "adequate," as the courts in equity use the word, without notice. To be adequate, denial of enforcement "must be plain and adequate, or, in other words, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity." *Boyce's Executors v. Grundy*, 28 U.S. (3 Pet.) 210, 215 (1830); *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 99 (CA6 1982); *Hjelle v. Brooks*, 377 F.Supp. 430, 437 (D.Ala. 1974). *See also O'Shea v. Littleton*, 414 U.S. 488, 502 (1974).

It is not a rebuttal to the Court of Appeals' decision to recite, as the SEC's brief does (Petrs. Br. 10, 25), that intervention at the enforcement proceeding is permissive only. See *Donaldson v. United States*, 400 U.S. 517 (1971). The target alleging *Powell* violations requires notice in order

to seek to intervene. *Donaldson* states that a target's intervention "in an enforcement proceeding might well be allowed when the circumstances are proper. . . . The usual process of balancing opposing equities is called for." 400 U.S., at 530. For example, in *Donaldson* itself the taxpayer-target asserted "nothing more than a desire . . . to counter and overcome [the subpoena recipients'] willingness, under summons, to comply and to produce records." *Id.*, at 531. The Court held that that interest "is not enough and is not of sufficient magnitude" to allow intervention. *Id.* The Court contrasted that interest of the taxpayer to "a protectable interest, as, for example, . . . to the extent he may claim abuse of process."[10] *Id.* Targets making that claim may have a right to intervene, depending on all the circumstances and the balance of equities. But certainly nothing in *Donaldson* forecloses a target claiming *Powell* violations in third-party subpoenas from gaining intervention. Only if it were clear that targets making such claims could never intervene would the permissive nature of intervention at the subpoena-enforcement proceeding negate the need for notice to the

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[10]The Court stated further that a taxpayer could claim abuse of process in a subsequent trial, citing *United States v. Blue*, 384 U.S. 251 (1966). The Court certainly did not imply that in all cases abuse of process could be raised only at a subsequent trial. Rather, the Court meant that abuse could be raised at a criminal trial, such as in *United States v. Blue*, *supra*. The Court's statement was doubtless prompted by the taxpayer's claim in *Donaldson* that the IRS had used civil subpoenas to gather evidence for a criminal prosecution. In contrast, a claim of abuse of process would not avail the injured target at a subsequent civil proceeding, for the Court has never applied an exclusionary rule to civil trials. *United States v. Janis*, 428 U.S. 433 (1976). Thus, the Court's statement in *Donaldson* that a claim of abuse of process is "a protectable interest" would support a target seeking intervention to prove *Powell* violations in third-party subpoenas.

targets. See *e.g., Application of Cole, supra*, 342 F.2d, at 8.[11]

In sum, the Court of Appeals correctly recognized the target's interest in freedom from SEC subpoenas in bad faith, whether issued to him or a third-party. Bound by *Reisman* to direct the complaining target to a subpoena-enforcement proceeding, but aware that the target's interest will depend on the mere chance of a third-party's resistance, the Court of Appeals ordered notice to the target of subpoena issuances. The court thereby ensured that denial of enforcement will be available to the target who proves bad faith.

II.

BY ORDERING NOTICE IN THIS CASE, THE COURT OF APPEALS DID NOT ABUSE ITS EQUITABLE POWER TO FASHION A DECREE REQUIRED BY THE CIRCUMSTANCES.

The federal courts have a broad power in equity to fashion the decree required by a particular case. Such power includes the discretion to fashion a decree that ensures the availability of an otherwise uncertain legal remedy. An exercise of such power is reversible only for abuse of discretion.

The Court of Appeals in this case did not abuse its discretion in assuring the adequacy of denial of enforcement at a subpoena-enforcement proceeding as a remedy to targets for third-party subpoenas issued in bad faith. The court's order contemplates only a familiar and already established procedure. The order will not unduly burden SEC investigations and is not an improper imposition of procedures. Instead, the order forestalls the need for an exclusionary remedy at any subsequent proceedings.

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[11]The Court need not decide that all allegations of *Powell* violations will warrant intervention at the subpoena-enforcement proceeding. The district court considering a target's request to intervene can decide upon the particular facts of each case. A notice order simply assures that the target will receive an adequate opportunity to make his request.

A. The Federal Courts Have the Equitable Power to Fashion Decrees Ensuring That Legal Remedies Are Adequate.

Respondents in this case invoked the equity jurisdiction of the federal courts in seeking to enjoin SEC violations of *Powell*. The hallmark of equity jurisdiction is flexibility. The Court stated in *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944):

> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims."

See also, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 61 (1975). The court below, however, felt constrained not to grant an injunction, as "[t]he basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-507 (1959); *Sampson v. Murray*, 415 U.S. 61, 88 (1974). *Reisman*, of course, held that denial of enforcement at the subpoena-enforcement proceeding is an adequate legal remedy negating an injunction.

The court's decision not to grant an injunction did not strip it of its equity powers. The court retained its equitable power to accord complete relief as required by the circumstances. See *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960). The circumstances of this case called for an order that corrected the practical problem of notice while respecting *Reisman* and the SEC's subpoena

power. Equity traditionally has enjoyed the power to correct mechanical inadequacies in the judicial system. *See* Development-Injunctions, 78 Harv. L. Rev. 994, 1022 (1965). The Court of Appeals exercised that power in this case by ordering notice to ensure the targets of their opportunity to challenge third-party subpoenas at subpoena-enforcement proceedings. Indeed, the court's duty to direct Respondents to their legal remedy implied a duty, and therefore a power, to assure that the legal remedy is adequate in practice as well as theory. Thus, the court had power, as a matter of equity, to mould the notice order.

In addition, the court's inherent power to protect its process empowered the court to ensure that denial of enforcement would in fact be an adequate remedy. According to *Gumbel v. Pitkin*, 124 U.S. 131, 145-146 (1888), "the equitable powers of the courts of the United States, sitting as courts of law, over their own process, to prevent abuse, oppression, and injustice, are inherent, and as extensive and efficient as may be required by the necessity for their exercise." *Powell* invokes the same protective power in admonishing that a "court may not permit its process to be abused." 379 U.S., at 58. See also *SEC v. ESM Government Securities, Inc., supra*, 645 F.2d, at 317.

Thus, the Court of Appeals had all the power necessary to order notice. As an exercise of equity and in protection of its own process, the court fashioned a decree to ensure that the subpoena-enforcement proceeding would afford an adequate remedy.

B. The Court of Appeals Did Not Abuse Its Discretion in Ordering Notice of Third-Party Subpoenas Where Abuse of Third-Party Subpoenas Is Alleged.

The Court of Appeals' exercise of equity power is reversible only for abuse of discretion. *Weinberger v. Romero-Barcelo, supra*, 456 U.S., at 320. The court did not abuse its discretion in this case.

1. The Notice Order Contemplates a Procedure Already Devised and Familiar.

The District Court erred in shying from the request for notice because it is a "novel remedy." (Pet. App. 12a.) Respondents are not the first to allege abuse by the SEC, and their request for notice invokes the same procedure and allocation of proof that courts of appeals have devised for handling targets' requests for evidentiary hearings or for discovery against agencies issuing subpoenas. Targets who allege bad faith or other abuse in an agency investigation may request a hearing or discovery against the agency. When the target presents some evidence of the claimed abuse, the courts of appeals have said that discovery or a hearing is appropriate. *SEC v. Knopfler*, 658 F.2d 25, 26 (CA2 1981) (per curiam), *cert. denied*, 455 U.S. 908 (1982); *SEC v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 128 (CA3 1981) (en banc); *United States v. Kis*, 658 F.2d 526 (CA7 1981), *cert. denied*, 455 U.S. 1018 (1982); *United States v. Fensterwald*, 553 F.2d 231, 232-233 (CADC 1977), (per curiam); *United States v. Church of Scientology*, 520 F.2d 818, 823-825 (CA9 1975); *SEC v. Howatt*, 525 F.2d 226, 229 (CA1 1975). The courts have differed in their articulation of the quality and quantity of the evidence that warrants discovery, but have agreed that the target bears the initial burden to show some evidence of improper agency conduct.

A request for notice requires only this established procedure. The target bears the initial burden to present some evidence of bad faith in third-party subpoenas. The target could make this showing at an injunction hearing or at an enforcement proceeding on a subpoena about which the target knows. The target's evidence must suggest claims that will warrant denial of a subpoena if proven at an enforcement proceeding on that subpoena. If the target makes

this prima facie showing, the court should order notice of third-party subpoenas so that the target can pursue his opportunity to present his evidence and obtain his legal remedy at the enforcement proceeding.

This procedure presents no new or novel problems to the courts or the SEC. The Court of Appeals in this case cannot be said to have abused its discretion by making an order that contemplates this familiar procedure.

2. An Order of Notice Is Not an Imposition of Procedures on the SEC.

The SEC erroneously suggests that the Court of Appeals acted beyond its power by imposing a new administrative procedure on the agency. (Petrs. Br. 23, n. 27, 25-26; Pet. for Cert. 9-10, n. 25.) The court did not violate the well-established rule that agencies are free to determine their own procedures. *Steadman v. SEC*, 450 U.S. 91, 104 (1981); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978); *FCC v. Schrieber*, 381 U.S. 279, 290-291 (1965). None of these cases concern the court's equitable power to fashion a decree in appropriate circumstances to ensure that a legal remedy is adequate. The SEC's freedom under these cases to designate its own administrative procedures is not a freedom to investigate in violation of *Powell*, nor is it a freedom from orders the court makes to protect against abuse of process. The SEC cannot exploit, in the name of administrative integrity, the target's handicap in not knowing when or where he may find an enforcement proceeding to put on his proof of administrative abuse. Concern for the SEC's prerogative over its procedures cannot be a basis for determining that the court abused its discretion in ordering notice.

3. Notice Is Preferable to an Exclusionary Remedy.

The District Court refused to order notice because, in part, it concluded that Respondents had an alternative adequate remedy in a motion to suppress evidence obtained through bad faith. The Court of Appeals choose instead to prevent the abuse. That choice did not exceed the court's discretion.

The societal costs of an exclusionary rule and the limits of its deterrent force are familiar to the Court. Because of those costs and limitations, the Court has not applied an exclusionary rule to suppress evidence in civil proceedings. *United States v. Janis*, 428 U.S. 433, 447 (1976). The Court of Appeals therefore avoided the troublesome exclusionary rule altogether, in favor of the notice order that also allows a surer remedy for bad-faith subpoenas. The court did not abuse its discretion in fashioning the preferable remedy.

4. Notice Will Not Unduly Burden SEC Investigations.

For several reasons, the SEC's claims that notice will corrupt and delay investigation are extravagant. A notice order will not unduly burden SEC investigations.

First, the SEC's third-party subpoenas need not be subject to a notice order in every investigation. Notice is appropriate, however, upon a prima facie showing by the target of SEC bad faith. Thus, the SEC itself will hold the greatest control over the possibility of a notice order: none need necessarily be made so long as the SEC's subpoenas satisfy *Powell*.

Second, notice will not cause undue delay. Presumably each SEC subpoena bears a return date by which the recipient is to comply if he intends to do so. Before that date, the SEC has no ground to complain of delay. A notice order need not extend the return date. With or without notice given, the SEC can seek enforcement as promptly as it

chooses after the return date. Notice therefore injects no more delay into an investigation through subpoena than the mechanics of the subpoena itself require. The SEC's bemoaning of delay strikes a particularly false note in this case, where the SEC waited more than a year after initiating the investigation before attempting to enforce subpoenas. (Resps. Op. to Cert. 5, n.3)

Third, notice will not result in the undermining of witnesses or evidence feared by the SEC. The court that orders notice in its equity power has the full ability to protect against abuses by the target. The court can enter such protective or limiting orders as the circumstances dictate. The court should not indulge, however, in the presumptions of lawlessness that the SEC allows itself. (Petrs. Br. 27-29; Pet. for Cert. 12-13.) There is no basis for concluding in the abstract that targets will obstruct investigations. As the SEC enjoys a presumption of lawful activity, see *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926), so the investigation target should be presumed responsible unless shown otherwise. A court faced with specific SEC allegations of misconduct in connection with a notice order may tailor such relief as is appropriate.

Fourth, a notice order will not engender needless litigation. Subpoena-enforcement proceedings that may not otherwise have occurred will not be needless if they are required to protect the target's interest. On the other hand, targets intent on obstruction are likely to obstruct with or without notice. The SEC has had to obtain relief in the past from obstruction, and will again in the future. But notice does not present so great a risk of obstruction as to outweigh alone the need to assure protection of the target's right.

In summary, the federal courts have the power to order notice of third-party subpoena issuances to ensure that targets alleging SEC bad faith have an adequate remedy at a subpoena-enforcement proceeding for abuses proven there. The Court of Appeals did not abuse its discretion in ordering notice in this case.

III.

THIS COURT SHOULD NOT DECIDE IN THIS CASE WHETHER NOTICE OF THIRD-PARTY SUBPOENA ISSUANCE IS REQUIRED IN EVERY SEC INVESTIGATION.

The decision below raises the question whether a district court may order notice of subpoenas when an investigation target alleges SEC bad faith in third-party subpoenas. For the reasons stated above, a court may make such an order in its equitable discretion if the target produces prima facie evidence of bad faith. This case does not raise the question whether notice is appropriate in every SEC investigation. Amicus Wedbush believes that notice is required in every investigation, but respectfully suggests that the Court not reach that question. Resolution of that question is unnecessary to the decision of this case, and is not required to resolve any conflict of opinion among the courts of appeals. The question warrants further deliberation among the lower courts on fuller factual records.

If the Court were to address the question of notice of every investigation, the Court should hold that notice is required in every investigation to enable the target to assert his interest in the SEC's conformance with *Powell*. As explained above, third-party subpoena recipients lack the incentive, knowledge, or nerve to question SEC subpoenas. The target alone has sufficient interest to assert the *Powell* standard. Without notice, however, even the target cannot adequately enforce his interest, and the SEC is routinely free from any burden of proving compliance with *Powell*.

The SEC can compel sworn testimony and document production through third-party subpoenas without any judicial check. Congress, however, plainly envisioned that the courts restrain agency subpoena abuse, and for that reason made agency subpoenas enforceable only by the courts. Notice to targets of subpoena issuances make effective the judicial check that Congress envisioned and the good-faith standard that *Powell* required.[12]

For three reasons, however, this Court should not decide the question whether notice is required in every SEC investigation. First, the Court's decision on that question could

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[12]The SEC argues at length that neither the Constitution or the securities laws support the notice order decreed by the Court of Appeals. These questions are considerably harder than the SEC suggests. First, it should not be conceded, whether or not Respondents have, that the Due Process Clause of the Fifth Amendment does not support the notice order to protect the target's *Powell* interest. That position is open after *Hannah v. Larche*, 363 U.S. 420 (1960). Those who sought information in *Hannah* about the Civil Rights Commission investigation asserted no established, protected legal right. *Id.*, at 442-443. Due process therefore did not require the rights of identification and cross-examination requested. Investigation targets assert the established right to be free from agency bad faith. The protections to be accorded that right depend on a different balancing of interests than was appropriate to *Hannah*.

Second, there is a question whether the *Powell* standard is strictly federal case law or rests to some degree on the Fourth Amendment protection against unreasonable search and seizure. The *Powell* standard and the Fourth Amendment requirements for subpoenas "overlap," as the SEC notes. (Petrs. Br. 26, n. 31). See also *In re Horowitz*, 482 F.2d 72, 75-79 (CA2 1973). To the extent that the target's interests protected by *Powell* are constitutionally based, they may warrant greater protection than notice of subpoena issuances.

The SEC's brief also discusses the Right to Financial Privacy Act of 1978, 12 U.S.C. §3401, *et seq*. That Act does not influence the question whether the courts in their equitable powers may order notice to ensure the target a remedy for *Powell* violations. Nothing in the legislative history of the Act suggests that Congress intended to restrict or confine the federal court's equitable powers. Only the clearest statement of such an intention would justify such an interpretation of the Act. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). The SEC does not suggest that Congress had any such intent in the Act. Accordingly, the Act is inapposite except as it suggests that Congress deemed notice a workable device to protect interests put at jeopardy by agency subpoenas.

only be dictum because a resolution of the question is unnecessary to the disposition of this case. The record shows allegations, deemed to be true, of SEC abuses in third-party subpoenas. The Court of Appeals ordered notice to ensure Respondents an opportunity to present proof of their allegations at a subpoena-enforcement proceeding. The only question raised by this record is whether the Court of Appeals abused its equitable discretion in ordering notice under those circumstances.

Second, no conflict exists among the courts of appeals whether targets should receive notice in every SEC investigation in order to assert their interests in compliance with *Powell*. In none of the prior cases that recognized the practical problem of a target's lack of notice did the court address its equitable power to order notice for the preservation of the target's ability to assert the *Powell* interest. *Application of Cole, supra*, 342 F.2d 5; *United States v. Schutterle, supra*, 586 F.2d 1201; *United States v. Genser, supra*, 582 F.2d 292; *Scarafiotti v. Shea, supra*, 456 F.2d 1052; *Kirchenbaum v. Beerman, supra*, 376 F. Supp. 398. Only the recent district court decision in *PepsiCo., Inc. v. SEC*, 563 F. Supp. 828 (S.D.N.Y. 1983), considers the question of notice in every investigation.[13] This Court has no need to address that question unless and until the courts of appeals have addressed it and differed in their opinions.

Third, the broader question requires a fuller factual record and deserves more deliberate lower-court consideration than this case affords. The Court's decision may affect subpoenas

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[13] *PepsiCo.* does not suggest that the Court of Appeals in the case before the Court exceeded its equitable powers. In denying notice, the court in *PepsiCo.* stated, "PepsiCo. has not identified a single subpoena issued by the SEC that even arguably violates the principles in *Powell*, or that seeks information on a subject or from a source that could possibly lead to the relevation of privileged material." 563 F. Supp., at 830.

its proof of showing legitimacy, the statutory subpoena-enforcement action constitutes an adequate remedy at law, preventing SEC abuse of investigatory authority.[10/]

However, if the target is not aware of the issuance of third-party subpoenas, then the subpoena-enforcement action is not an adequate remedy at law. The Congressionally-mandated forum for scrutinizing the SEC's exercise of investigatory authority is effectively bypassed. Through lack of motive or ignorance of

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10/ As to each subpoena, the SEC must meet Powell requirements. An agency subpoena to one party may meet the test; but a subpoena to a second party may fail. See U.S. v. Theodore, 479 F.2d 749 (4th Cir. 1973), in which the court found that an IRS summons to a third-party accountant of the target taxpayer was "too broad and too vague to be enforced". See also U.S. v. Harrington, 388 F.2d 520 (2d Cir. 1968), in which the court ordered enforcement of an IRS summons to a third party but only after finding the IRS summons was relevant and not over broad.

their rights, most non-target third parties will not resist compliance with agency subpoenas.[11/] As this Court has noted:

> "True, there can be no penalty incurred for contempt before there is a judicial order of enforcement. But the subpoena is in form an official command, and even though

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[11/] A subpoena is issued because compulsion is necessary to coerce information a person will not voluntarily give. A target has an obvious interest in whether or not the agency investigation is lawful. If the agency has no legitimate purpose for investigating the target, or seeks information not relevant to that purpose, or otherwise acts unlawfully, then the target should not be subjected to the investigation and its adverse effects. However, a non-target third party does not share these same interests. A third party suffers only the inconvenience of producing documents or giving testimony as requested and no other adverse effects. Common sense tells us that the third party does not have the conviction of principle or other motivation required to undertake the costs of litigation inherent in litigating with the government. Additionally, because of the coercive form of the agency subpoena, a third party may not know that the agency subpoena is not enforceable unless first ordered by a court.

> "improvidently issued it has some coercive tendency, either because of ignorance of their rights on the part of those whom it purports to command, or their natural respect for what appears to be an official command, or because of their reluctance to test the subpoena's validity by litigation." Cudahy Packing Co. v. Holland, 315 U.S. 357, 363-64 (1942), quoted in U.S. v. Menker, 350 U.S. 179, 187 (1956).

The government is frank to admit that it seeks to avoid subpoena-enforcement actions required by Section 21(c) of the Exchange Act.[11/] The government argues that notice will result in an increase in the number of subpoena-enforcement actions and that this will turn SEC investigations into trial-like proceedings. As the Court of Appeals noted, subpoena-enforcement actions are summary proceedings and have priority on court

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11/ The government argues that a notice requirement constitutes the court's imposition of procedural rules on the executive branch in violation of FCC v. Schreiber, 381 U.S. 279 (1965). However, as stated in SEC v. Csapo, 533 F.2d 7 (D.C. Cir. 1976):

calendars. The SEC's burden of showing the Powell requirements is not difficult, and in most cases may be done by affidavit. Once the showing is made, the subpoena is enforced unless a party affirmatively shows the SEC's conduct is unreasonable. Such "burden is not easily met". SEC v. Brigadoon Scotch Distributing Co., 480 F.2d 1047, 1056 (2d Cir. 1973).

The government raises a "parade of horribles" listing the ways targets with

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11/ (Continued)
"Nor do we find anything to the contrary in FCC v. Schreiber . . ., heavily relied on by the Commission. Although the Court there counseled judicial restraint in interfering with the broad procedural powers delegated by Congress to the federal agencies, it nevertheless reaffirmed the responsibility of the courts to insure that administrative action is consistent with governing statutes and constitutional requirements." 533 F.2d at 11 (citations omitted). See also SEC v. Higashi, 359 F.2d 550 (9th Cir. 1966).

notice could obstruct agency investigations; however, "such speculation is insufficient". SEC v. Csapo, 533 F.2d 7, 11 (D.C. Cir. 1976). See also Sells Engineering, supra. By requiring notice, the Court of Appeals has done no more than ensure the effectiveness of Sections 19(b), 20(a), and 22(b) of the Securities Act and Section 21 of the Exchange Act. If notice is not given to targets, then the SEC effectively avoids the Congressionally-mandated checks and balances for prevention of agency abuse.[13/]

[13/] The government argues that notice is not required because the target may assert a claim of abuse of process in any subsequent trial. The government cites Donaldson, supra, which, in turn, cites U.S. v. Blue, 384 U.S. 251 (1966). Blue is a criminal case. An SEC investigation may result in criminal or civil prosecution. While there may be the remedy of suppression of evidence for SEC abuse of authority in a criminal action, there clearly is no such remedy in a civil action. This Court has never

B. The Court of Appeals' Decision Is Not Contrary to Other Decisions.

The government argues that the Ninth Circuit decision conflicts with In Re Application of Cole, 237 F. Supp. 274 (S.D.N.Y. 1964), rev'd, 342 F.2d 5 (2d Cir. 1965), cert. denied, 381 U.S. 950 (1965) and Scarafiotti v. Shea, 456 F.2d 1052 (10th Cir. 1972). However, both cases are clearly distinguishable.[14/]

[13/] (Continued) held that evidence obtained by the government, even in violation of the Constitution, may be suppressed or excluded in civil proceedings. See U.S. v. Janis, 428 U.S. 433 (1976). Respondents are aware of no cases in which evidence obtained by abuse of process has, in fact, been suppressed.

[14/] The Court of Appeals' decision is not based upon consitutional provisions. It distinguishes decisions holding that there is no constitutional right to notice of third-party subpoenas. U.S. v. Schutterle, 586 F.2d 1201 (8th Cir. 1978) (due process), is thus inapplicable. Likewise, the prior Ninth Circuit decisions in Kelley v. United States, 536 F.2d 897 (1976) (Fourth and Fifth Amendments), and Howfield, Inc. v. United States, 409 F.2d 694 (1969) (unconstitutionality), are inapplicable.

In Cole, the taxpayer target sought notice of an IRS summons to a known third party, the taxpayer's bank. Because the third party was known, the target was able to force the IRS to initiate a subpoena-enforcement action, and the Second Circuit was in a position to determine that the target had no standing to intervene.[11/] Unsurprisingly, the Second Circuit found that the target, "at least in the factual situation presented by this case", did not need notice of a known third-party summons. 342 F.2d 7. The Second Circuit specifically declined "to discuss" whether or not this Court's Reisman decision inferred a notice requirement. 342 F.2d 7. Additionally, because the target did not question the

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[11/] This Court's decision in Donaldson, supra, cited In Re Cole, supra, for the proposition that intervention in a subpoena-enforcement action is permissive and not a matter of right.

IRS's exercise of authority, the Second Circuit did not cite nor discuss this Court's decision in Powell.[11/]

In Scarafiotti v. Shea, the target taxpayer commenced a mandamus action against an IRS agent. The taxpayer asserted no protectable interest under Donaldson v. U.S., 400 U.S. 517 (1971), or Powell but simply demanded an order requiring the agent to give notice of its third-party interviews. The Tenth Circuit, citing In Re Cole, denied the taxpayer's request:

> "Before mandamus will issue, 'it must appear that the claim is clear and certain and the duty of the officer involved must be ministerial, plainly defined, and peremptory.'
>
> ". . . .
>
> "Clearly, the duty here claimed is not so plainly defined 'as to be free from doubt.'"

11/ Powell had been decided only seven weeks prior to the argument in Cole before the Second Circuit.

> 456 F.2d 1053, quoting from Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364, 367 (10th Cir. 1966).

The Tenth Circuit did not undertake to decide the notice issue.[17]

In the case at hand, unlike Cole, respondents seek notice of third-party subpoenas of which they are not aware. Unlike Scarafiotti, this is not a mandamus action. Unlike Cole and Scarafiotti, respondents assert protectable interests under Powell and Donaldson; respondents claim that the Powell standards have not

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[17] In a subpoena-enforcement action, the burden of showing compliance with the statutory standards of Powell is on the SEC. The SEC has possession of the evidence to make the showing. The subpoena recipient, or target, simply does not have access to such evidence in most situations. If the SEC can avoid a subpoena-enforcement action, then the target has no remedy but to bring an injunctive action. In an injunctive action the regularity of agency action is presumed, and the burden of proof is on the target. The target simply is unable to meet the burden.

been met by the SEC. Unlike Cole, respondents have not had opportunity to question the SEC's showing of lawfulness of the third-party subpoena. Unlike the Second and Tenth Circuits, which did not decide the issue, the Ninth Circuit specifically determined that a target party is entitled to notice of third-party subpoenas.[11/]

C. Agency Investigations Are Not Grand Jury Investigations.

The government argues that, because no statute expressly provides for notice

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[11/] The SEC points to the recent decision of the Southern District of New York in PepsiCo, Inc. v. SEC, 563 F. Supp. 828 (S.D.N.Y. 1983). Unlike the case at hand, plaintiff in that case had apparently received a subpoena and was not challenging the subpoena or the purposes of the investigation. The district court denied a temporary restraining order, citing U.S. v.Miller, 425 U.S. 435 (1976), and Hannah v. Larche, supra, which the Ninth Circuit in its decision distinguished, as well as Application of Cole, supra. The district court invited a prompt appeal to the Second Circuit.

of agency subpoenas, Congress did not intend such notice to be given. The government argues that Congress intended that SEC investigations proceed, like grand jury investigations, under a cloak of secrecy. The government ignores the basic proposition that in our system of free and open government, secrecy is the rare exception, and notice is the rule. The grand jury is allowed to operate in secret only because of institutional checks and balances, and only under express provision for secrecy in Rule 6(e) of the Federal Rules of Criminal Procedure.

The government's argument is inconsistent with the reasoning of this Court in the Sells Engineering decision. Although Congress has granted the SEC the authority to make investigations, Congress has clearly not granted the SEC

the "extraordinary powers" of the grand jury; Congress has granted to the SEC "usual, more limited avenues of investigation". Sells Engineering, supra, 77 L. Ed. 2d 752, 757-58.

Although Congress has granted the SEC authority to investigate, such grant does not imply the authority to operate in secret. This Court has properly held that agency investigations, like grand jury investigations, may be initiated without probable cause. Oklahoma Press, supra; Powell, supra. However, beyond this one common element, any analogy between the grand jury and the SEC fails.

This Court has carefully refrained from suggesting that agency investigations are identical to grand jury investigations. Hannah v. Larche, 363 U.S. 420 (1960); SEC v. ESM Government Securities, Inc., 645 F.2d 310 (5th Cir.

1981)[12/]. The contrasts are irreconcilable:

(1) The grand jury is of constitutional origin. In contrast, the SEC is solely a creature of statute.

(2) The grand jury is a body of private citizens serving for a limited duration. In contrast, the SEC is an ongoing agency of the executive branch.

(3) The grand jury operates "independently" of the prosecutor as a check and balance upon possible prosecutorial abuse. Sells Engineering, supra, 77 L. Ed. 2d 756. In contrast, the SEC operates without this division of function. SEC v. ESM, supra, 645 F.2d 312-13. The only check and balance upon the SEC is the subpoena-enforcement action of Section

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12/ Hannah v. Larche, supra, cited extensively by the government, involved the Commission on Human Rights. That Commission was a purely investigatory agency and, unlike the SEC, had been granted no prosecutorial function.

22(b) of the Securities Act and Section 21(c) of the Exchange Act.

(4) The grand jury performs the "dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions". Sells Engineering, supra, 77 L. Ed. 2d 752, quoting Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972). In contrast:

> "Although the SEC has a dual function, it is not an historic guardian of individual liberties. Instead, its two functions are investigation of possible illegal activities, and adjudication of alleged violations. . . . The SEC is not, like the grand jury, a protector of individuals against government prosecution. . . . There is no division of functions . . . between police and the grand jury. . . ." SEC v. ESM, 645 F.2d 312-13, citing Hannah v. Larche, 363 U.S. at 446-47.

(5) A grand jury investigation is strictly a criminal proceeding and cannot be utilized to investigate noncriminal violations. Sells Engineering, supra.

of other agencies and will certainly affect most investigations of the SEC. The significance and wide-spread consequence of a decision of the broad question cannot be doubted. But critical aspects of the broad question have no factual foundation in the record. There are no findings of fact on the administrative burden to the SEC of giving notice, no findings on possible alternative methods of notice, and no findings on the timing or contents of notice. The record contains no foundation for the wholesale presumption of lawlessness which the SEC attributes to targets in its brief. The courts below did not meaningfully consider the remedies available to the SEC and the courts to prevent or punish obstructions of investigations. Nor did the courts make any findings whether notice would in fact delay investigations longer than the mechanics of subpoena enforcement themselves require.

In summary, the Court should not decide the question whether notice of third-party subpoena issuances is required in every SEC investigation. Amicus Wedbush believes that a realistic ability in the target to assert his interest in compliance with *Powell* requires such notice, but recognizes that the facts of this case, the lack of a conflict, and the insufficient record counsel against a decision on that question in this case.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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March 22, 1984